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No. 81-2268

In the Supreme Court of the United States

OCTOBER TERM, 1981

SMITHKLINE CORPORATION, PETITIONER

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, AND UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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The government's petition in No. 81-2082 and SmithKline's cross-petition in No. 81-2268 raise precisely the same legal issues that are presented in *Bowsher* v. *Merck & Co.*, cert. granted, Nos. 81-1273 and 81-1472 (Apr. 19, 1982).

Both petitions should be held pending this Court's decision on the merits in *Merck* and then disposed of in a manner consistent with that decision. No useful purpose would be served by full briefing and oral argument of the identical issues presented in *SmithKline*.[1] Indeed, if the Court were to accept SmithKline's suggestion and grant the

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[1]The cases cited by SmithKline (81-2082 Br. in Opp. 4 n.3)—*Baxter* v. *Palmigiano*, cert. granted, 421 U.S. 1010 (1975), and *Enomoto* v. *Clutchette*, cert. granted, 421 U.S. 1010 (1975)—although similar, involved legal and factual situations sufficiently disparate (challenge to

instant petitions so the case could be argued in tandem with *Merck*, it would require the oral argument in *Merck* to be rescheduled for a later date. There is no justification for such postponement. Should SmithKline wish to supplement the arguments to be presented by Merck it may do so as amicus curiae in Nos. 81-1273 and 81-1472.

It is therefore respectfully submitted that the petition in No. 81-2082 and the cross-petition in No. 81-2268 should be held pending the decision in *Bowsher* v. *Merck & Co.*, Nos. 81-1273 and 81-1472, and should then be disposed of as appropriate in light of that decision.

REX E. LEE
Solicitor General

JULY 1982

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procedures used in prison disciplinary proceedings in California and Rhode Island) to warrant plenary treatment of both cases, thus assuring a full hearing on all issues. See *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976). Here, in contrast, the meaning of the same statutory and contractual provisions is at issue in both cases. No additional light would be shed on the issue by the *SmithKline* record or by additional briefing and argument in *SmithKline*.